> that 30 seconds after the single blast he sounded the alarm, ordered the engines stopped and gave the right wheel order which was executed, bringing the tanker slightly south of the Range; * * *."

The right wheel order, if given, was given solely to avoid colliding with the carfloat tow. The tanker did not proceed to the right, to the south of the range course and toward Dimond Reef under the right wheel order to avoid petitioner's tow.

Pilot Rowohlt, when testifying to and explaining the claimed right wheel order and the action of the tanker in going to the south of the range course, testified as follows:

> "Q. When you say 'cracked to the south', would you explain a little more what you mean by that? A. Well, in other words, instead of running directly head on to the range, and by opening the red light to the south of the green light, that would bring me off the range, in other words, south of the range, to avoid colliding with the carfloats" (Appendix hereto p. 51a).

The Court of Appeals accepted the pilot's testimony and held that in judging and testing responsibility the final decision rested on the answer to the question—why did the tanker leave the range course? The test of fault was set forth as follows:

> "Accordingly, we must test the question of fault on the part of the tanker by ascertaining what, if anything, Rowohlt could have done to avoid running down the carfloats or coming perilously close to the reef after he sounded the danger signal" (Appendix hereto p. 38a).

The statement sets forth the questions involved not only with respect to the fault or freedom from fault of the tanker, but also the liability or non-liability of petitioner.

The question as to what the tanker could have done to avoid running down the carfloat tow shows that petitioner's sand tow did not cause the tanker to take any action or make any change of course. The respondents' proof clearly shows that the tanker did not change her course to avoid colliding with petitioner's tow.

The question of fault on the part of petitioner's tow is answered by the question posed by the Court of Appeals. The tanker went to the right "to avoid running down the carfloats", not the petitioner's tow and therefore petitioner was without fault.

The question and test of the Court of Appeals completely exonerates petitioner's vessels and shows that the finding and holding of the District Court was not erroneous.

The District Court, in making its finding that petitioner's tow was not in any way involved, stated that it determined that "(t)he liability in this case has been determined largely on the testimony of the libellant's witnesses."

In this connection the District Court found as follows:

> "This fact is found as well in the testimony of the tanker's master which is most important. He ran from his chartroom when he heard the alarm and saw the railroad float off the starboard bow. He never saw the Metpolitan float. If the master of the vessel could not see Metropolitan then it means that tow was never in the picture" (A. 674a-675a).

The Court of Appeals held that this finding was clearly erroneous.

The master of the tanker was a man with 41 years of experience at sea. He had been alerted by the alarm signal sounded by his tanker and he immediately ran into the wheelhouse to make observations in order to ascertain the reason for the alarm signal and what, if anything, was endangering his vessel or interfering with the intended course of his vessel. He observed a railroad carfloat tow ahead off the starboard bow and heading to cross the bow

of the tanker. He also looked ahead and to his left over as far as the Battery. In addition to making observations from the wheelhouse he also made observations from the port wing of the tanker's bridge. He observed vessels and tows to the port of the tanker which were well off the port or left side of the tanker and over towards the Battery. He observed a tow off the port side of the tanker but, due to the fact that this tow was so far to the left of the tanker and in no way endangering the tanker or interfering with its navigation, he did not take particular note of the tow or identify it.

The Court of Appeals held that the Metropolitan sand tow was a "huge, slow moving, cumbersome" flotilla, with an overall length of 500 feet. If such a tow was in close proximity to the tanker *Rincon Hills*, in any way endangering the tanker or interfering with the tanker's intended course, it is clear that the experienced master of the tanker, who had been alerted by an alarm signal, would have observed the Metropolitan sand tow. The fact that he did not observe the Metropolitan sand tow under the existing conditions clearly shows that it was not in the picture, as held by the District Court. It further shows that the tanker did not proceed under a right wheel in order to avoid collision with petitioner's tow. This fact is apparent in the finding made by the Court of Appeals that the tanker went under a right wheel to avoid collision with the carfloat tow, as testified to by the pilot of the tanker (Appendix hereto p. 38a) who was in charge of navigation.

The Court of Appeals in reviewing the testimony of respondents' witnesses held that one of respondents' witnesses testified that he saw the sand tow cross the bow of the tanker as the danger signal was blown (Appendix hereto p. 25a). The Court was referring to Captain McConnell, mate of the tug *William Meseck* which was accompanying the tanker. This witness did not testify to any such fact and when he was asked if he observed the sand tow at the time the alarm signal was blown or if she had disappeared from

view at that time, he testified that he did not have any recollection of the sand tow or whether it was still in view or not (R. 1538, 1539; Appendix hereto pp. 54a, 55a). Neither the mate of the tug *William Meseck* nor any other witness in the case testified petitioner's sand tow crossed the bow of the tanker. Another of libellant's witnesses, the master of the tug *Heyward Meseck*, which was also accompanying the tanker *Rincon Hills*, refused to testify that the Metropolitan sand tow crossed the bow of the tanker (Appendix hereto p. 53a).

The District Court held that the helmsman's wrong wheel maneuver, which was contrary to the specific orders of the pilot and the 2nd officer of the tanker, was negligence and caused and contributed to the grounding.

The Court of Appeals held that this finding and holding was erroneous and that the admittedly wrong wheel maneuver was an error in extremis.

In its reasoning leading up to this conclusion the Court below found that at the time of the wrong wheel maneuver the possibility of collision had passed and that the order of the pilot for hard left was proper. It further found that if the order of the pilot had been properly executed it was possible that the grounding of the tanker would have been avoided.

The findings of the Court of Appeals show that an extremis situation did not exist at the time the helmsman executed the wrong wheel maneuver, contrary to specific orders and instructions. The findings show that there was not danger of collision between the carfloat tow and the tanker at the time her wheel was put to the right instead of to the left, because the carfloat tow was clear of the stem of the tanker and the court admitted that there was a possibility that the stranding would have been avoided had the wheelsman done as he was told. The court found that an extremis situation existed because the helmsman *thought* that one existed when it did not exist in fact because the carfloat tow was clear of the stem of the tanker

and she could have proceeded straight ahead without the possibility of collision.

An error in extremis was not committed in this case and the act of the wheelsman in disobeying orders under the facts as found by the Court of Appeals was nothing less than gross negligence on the part of the wheelsman. The wheelsman was not in a position to or required to exercise his discretion or judgment as to the manner in which the tanker should be navigated. The only two men on the bridge at the time of the occurrences involved who had the right and the obligation to exercise their discretion or judgment as to navigation were the pilot and the master of the tanker. The master, of course, had the authority at all times to overrule the orders of the pilot if in the master's judgment the pilot's orders would result in improper navigation.

In defining an error in extermis Justice LEARNED HAND in the case of *A. H. Bull S. S. Co.* v. *United States,* 2 Cir., 34 F. 2d 615 at page 616, held as follows:

> "Even in extremis, * * * some discretion is demanded; the phrase means no more than that less judgment is required in an emergency than when there is time to consider; it does not exculpate all faults; it is no more than a palliative."

The position of the wheelsman did not entail, demand or require that he exercise his discretion or judgment. His sole obligation was to obey the orders of the pilot and the 2nd officer. His disobedience of a specific order, which he admittedly acknowledged that he understood, cannot be called an error in extremis. The holding by the lower court as to the act of the wheelsman being an error in extremis opens the door for every disobedient seaman to claim that he was not disobedient nor negligent because when he deliberately failed to carry out the orders of his superiors he was acting in extremis. Such a ruling should not be permitted to stand. The foregoing shows that the

District Court was not clearly erroneous in its holding in this respect.

The Court of Appeals below found that "when the single blast signal was given the intended course of the two tows could not have been known by Rowohlt." The record clearly shows that pilot Rowohlt knew the position and course of the Metropolitan sand tow at the time of the one-whistle signal. The finding of the court below is directly contrary to the testimony of the pilot, even though the court stated it accepted his testimony (Appendix hereto p. 34a).

Pilot Rowohlt's Coast Guard testimony, as the course and destination of the Metropolitan sand tow, is as follows:

> "Q. And what position were you in when you gave the one blast signal to the tow? A. We were on the range but not up to it. We were not abeam yet of the northwest corner of Governor's Island.
>
> Q. What was the position of the tow? Where was that located? A. They were about abeam of the ferry, South Ferry that is, heading in a northwesterly direction."
>
> • • • • •
>
> "Q. And he was on the left side of the river, on his left? A. That would be on his right side of the river.
>
> Q. And how far off the pierheads was he? A. He was fairly in the middle.
>
> Q. Where did he appear to be bound? A. Well, I took it for granted he was bound for the stakeboats in Jersey City, and the Jersey Central also bound for Jersey City" (Appellant's App., pp. 793a-794a).

This testimony shows that the pilot knew the course and destination of the sand tow before he blew the one blast signal as that tow had proceeded to the right previous to the signal and was on its course to go around the Battery at the time the one blast signal was sounded. It further shows that as the carfloat tow had not started to swing to

the right the tanker pilot sounded his one blast signal to the carfloat tow indicating that the pilot wanted the carfloa tow to swing to the right and proceed on a course similar to the sand tow's so that a port to port passage could be carried out, as was being done by the sand tow. When the carfloat tow did not answer with a one blast signal the pilot sounded the alarm to wake up that tow (Met. App. 2).

Pilot Rowohlt's trial testimony on this point as to the Metropolitan sand tow is as follows:

> "Q. How long after that was it that you gave the one blast signal? A. After the first sighting?
>
> Q. Yes. A. Oh, I don't know. It may be a minute or two" (R. 339).
>
> • • • • •
>
> "Q. Why did you wait the interval you did at the time you first observed the tugs and tows until the time when you blew your one short whistle signal. A. Well, I waited for a decision because we weren't on head and head or anywheres near so. So I waited until I could make an estimation of which way they were going to head. At the first sighting there was such a difference in the headings that anything could be decided beforehand and, therefore, I couldn't make a decision which way they were going.
>
> Q. By that, then, do you mean that you waited until you reached that decision before you gave your one-blast whistle signal? A. That is right" (R. 373-374; Met. App. 2-3).
>
> • • • • •
>
> "Q. Captain, at the time you blew the one-whistle signal on the Rincon Hills and the two tows were in the position you have described and shown in the chart, at that time in your opinion could you safely have blown a two-whistle signal and proceeded accordingly? A. No, sir.
>
> Q. Why not? A. Well, the sand tow was—the head tow—was already heading in a westerly direc-

tion and I couldn't possibly go to the left on a two-whistle basis because he is so far to the left that if I was to continue on a course of such, I would have collision with the sand tow." (Appellant's App. 47a).

From the foregoing testimony of the pilot there cannot be any question of the fact that the District Court was correct and that the Court of Appeals incorrectly held that the pilot did not know the intended course of the sand tow. The pilot repeatedly testified that he knew the course of the sand tow and also testified that he knew the sand tow's destination. The fact that he knew the intended course of the sand tow is emphasized by his testimony that he did not sound a one-whistle signal until he could definitely ascertain what the intended course was. Despite the repeated statements of the pilot of the tanker the Court of Appeals held that he could not have known the intended course of the sand tow.

Reasons for Granting the Writ.

1. Respondents' petition raises the question as to petitioner's right to limit liability as granted by the Court of Appeals. The court below, in arriving at and in granting petitioner limitation of liability, considered the merits of the case. After considering the merits of the case it reversed the findings of the District Court as being erroneous. It did so under the well established rule that an appeal in admiralty was a trial de novo. It decided that one of petitioner's vessels was negligent, which gave rise to the question as to whether or not petitioner was entitled to limitation.

When respondents question in part the decision of the court below as to the granting of limitation to petitioner, this petitioner should be entitled to present to this Court the question as to whether or not the court below properly reached the question as to whether or not the right of limitation of liability was involved in the case. On a hearing be-

fore this Court on a writ of certiorari this Court stands in the same position as the Court of Appeals, when that court was considering the merits of the case with respect to the question as to whether or not the District Court's findings were clearly erroneous. In *McAllister* v. *United States*, 348 U. S. 19, it was held that in relation to the District Court's findings this Court stood in review in the same position as the Court of Appeals in an admiralty action. The question as to whether or not the Court of Appeals was correct in holding that the findings of the District Court were clearly erroneous was considered.

If the petition of respondents is granted, then this court should consider the merits of the case in order to determine whether or not the question of petitioner's right to limit was properly arrived at and considered by the Court of Appeals. *Rogers* v. *Missouri Pacific R. R. Co.*, and two other cases, 352 U. S. 559, 1 L. Ed. 515.

In order for petitioner herein to properly obtain relief from the erroneous decision of the court below when it decided that the question of limitation of liability was involved in the action because the District Court's findings were clearly erroneous, it is necessary that the petitioner have a writ of certiorari. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185; *LeTulle* v. *Scofield*, 308 U. S. 415.

As this court, when hearing a writ of certiora · considers the merits of the case involved, petitioner should not only be heard in this respect but should be permitted to ask for relief on the merits and unless it has its own writ of certiorari it cannot ask for or obtain relief to which it is entitled.

2. The Court of Appeals did not adopt or apply correct or appropriate standard of review as to petitioner. The District Court found that all of the petitioner's vessels were without fault and specifically, with respect to the tow in charge of the tug *Metropolitan No. 2*, found that that

tow "was never in the picture" (Appendix hereto p. 11a). The District Court stated that it based its findings largely on the testimony of libellant's witnesses (Appendix hereto p. 9a). The Court of Appeals held that the District Court was clearly erroneous with respect to petitioner's tow in charge of the tug *Metropolitan No. 2.*

The Court of Appeals, in considering whether or not the tanker was at fault, stated that it had to test the question of fault on the part of the tanker by ascertaining what, if anything, the tanker could have done to avoid running down the carfloats or coming perilously close to the reef. It is inherent in the question which the court posed to itself that it was not necessary for the tanker to take any action because of petitioner's tow. Any actions taken by the tanker were solely for the purpose of avoiding collision with the railroad carfloat tow. The test and the question posed by the Court of Appeals is based on the testimony of the pilot of the tanker and at one time he ordered a right wheel to leave a safe course on the range to avoid collision with the railroad carfloat tows. He did not testify that he ordered a right wheel to avoid collision with petitioner's tow. Despite the standard set up by the Court of Appeals, which solely involved the tanker and the railroad carfloat tow, the Court of Appeals proceeded to include petitioner's tow in the test and standard and apply the same to petitioner's tow unwarrantedly.

The question which the Court of Appeals posed to itself was in accord with the holding of the District Court, that petitioner's tow was no way involved in any action taken by the tanker to avoid collision with the railroad tow. Yet, the Court of Appeals went on to find that petitioner's tow was at fault and that the District Court was clearly erroneous. In doing so it did not apply the appropriate standards as required by this court in so far as petitioner's tow was concerned. This is further shown by the testimony of the wheelsman of the tanker when he claimed that he

executed the admittedly wrong maneuver, by going to the right instead of the left, he did so solely for the purpose of avoiding a collision with the carfloat tow. This witness for the libellant at no time claimed that he went to the right and toward Dimond Reef in order to avoid petitioner's tow.

The Court of Appeals committed error in not applying the appropriate standard and thereby concluded that petitioner's tow was at fault.

The master of the tanker who had been alerted by an alarm signal sounded by his vessel immediately began to make extensive observations. He observed the railroad carfloat tow ahead but at no time did he observe petitioner's tow, which the Court of Appeals held was a large and cumbersome tow (Appendix hereto p. 18a). With respect to this evidence of respondents the District Court held that he, the master, did see the railroad float but that "he never saw the Metropolitan float. If the master of the vessel could not see Metropolitan then it means that that tow was never in the picture" (Appendix hereto p. 11a).

The Court of Appeals held that this finding was erroneous and the fact that the master of the tanker did not see petitioner's float had no bearing in so far as the position or presence of petitioner's tow was involved in the case. Here we have the application of an improper standard which led the Court of Appeals to hold that the findings of the District Court were erroneous.

3. The Court of Appeals in excusing the tanker and the wheelsman for the wrong wheel maneuver held that it was an error in extremis (Appendix hereto p. 39a). The respondents' witnesses admitted the wrong wheel maneuver which was executed after the tanker pilot had given the proper order which was repeated by the officer on watch and also repeated and acknowledged by the wheelsman. The wheelsman was not in a position where he was required or permitted to exercise any discretion or judgment as to the navigation of the tanker.

In the case of *A. H. Bull S. S. Co.* v. *United States*, 2 Cir., 34 F. 2d 615, at page 616, Justice LEARNED HAND held as follows with respect to an error in extremis:

> "Even in extremis, * * * some discretion is demanded; the phrase means no more than that less judgment is required in an emergency than when there is time to consider; it does not exculpate all faults; it is no more than a palliative."

It is clear that the Court of Appeals in reversing the District Court applied an improper standard because the position of the wheelsman did not entail, demand or require that he exercise his discretion or judgment as to the navigation of the tanker. It was solely the duty of the pilot of the tanker or the officers of the tanker to exercise their discretion or judgment as to navigation. Such judgment had been exercised and it was the sole obligation of the wheelsman to obey the orders of his superiors. Under the holding of the Court of Appeals we now have a ruling which will permit any disobedient and negligent seaman to claim that he was acting in extremis when he failed to carry out proper orders and instructions.

That an error in extremis was not involved is shown by the holding of the Court of Appeals, that at the time of the execution of the wrong wheel maneuver a possible collision situation did not exist as danger of collision had passed (Appendix hereto p. 20a).

4. The Court of Appeals held that a head and head situation existed between the tanker and petitioner's tow at the time the tanker sounded her one-whistle signal, and applied Rule 1, Article 18 33 U. S. C. Sec. 203 and the Pilot Rules for Inland Waters, 33 C. F. R. Sec. 80.03. The basis of the holding that a head and head situation existed between petitioner's tow and the tanker was based on the testimony of the tanker pilot before the United States Coast Guard. This testimony is contained in Respondents'

Exhibit 10. A reading of the testimony shows that at the time the tanker pilot testified as to a head and head situation he was referring to the situation which existed between the tanker and the railroad carfloat tow and was not referring to petitioner's tow. This testimony is as follows:

> "Q. The tow with the carfloats was approximately on the range ahead of you? A. It was about on the range, yes, sir.
>
> Q. And the situation you had with them was one of meeting head and head? A. At the time, yes, sir" (Appellants App., p. 795a).

On the trial not one witness from the tanker, including the pilot, contended that a head and head situation existed at any time between the tanker and petitioner's tow. The pilot of the tanker testified that when he observed petitioner's tow it was not a head and head situation "or anywhere's near so" (Met. App. 2-3).

Respondents expert, Captain Gow, testified that the situation, as contended by the tanker pilot and other witnesses of the libellants, did not involve a head and head situation (Met. App. 59-60, 67). In applying the standard of a head and head situation to petitioner's tow the court below committed error. The only head and head situation involved was that between the tanker and the railroad carfloat tow, which was testified to by the pilot during the Coast Guard investigation.

The holding of the court below in the present case is in conflict with its holdings in the cases of *Construction Aggregates Co.* v. *Long Island R. Co.*, 105 F. 2d 1009; *Tucker* v. *Socony No. 9*, 167 F. 2d 685, and *The Delaware*, 66 F. 2d 467. It is also in conflict with the holding in *United States of America* v. *Steamtug William H. McAllister*, (SDNY) 110 F. Supp. 745.

The court below committed further error when it held that the tanker had the right to sound a one-whistle passing signal to two approaching tows. There is no provision in

the rules for such a passing signal. On the respondents evidence it is clear that when the tanker sounded her one whistle signal it was just a general information signal as to her intent to change her course to starboard so as to proceed on the range course, as testified to by the tanker's second officer and as found by the District Court (Appendix hereto p. 5a), which finding was held to be erroneous. If it was not a general information signal but a passing signal then the tanker was sounding that passing signal to the railroad carfloat tow, as the only contention of the pilot as to a head and head situation was with respect to the railroad carfloat tow, as testified to by him during the Coast Guard investigation.

The court below held that the single blast signal of the tanker was not a general information, courtesy or warning signal because the rules did not provide for such a signal. That an information or courtesy signal, not specifically provided for by the navigation rules has been recognized, is shown by the case of *Ira S. Bushey & Sons, Inc.* v. *Standard Oil Co. of Cal.*, (EDNY) 99 F. Supp. 63, affirmed with opinion, 2 Cir., 197 F. 2d 788.

When the tanker turned to the right to leave the main ship channel so as to proceed over to the East River she sounded a one blast signal to show her intention not to continue on up the North River but her intention to proceed toward the East River. In Title 33 C. F. R. Sec. 80.03, cited by the court below, it is provided with respect to a single blast signal, as follows:

> "One short blast of the whistle signifies intention to direct course to own starboard, * * *"

The Inland Pilot Rules clearly show that a vessel may make her intent known by sounding a signal. When a single blast is blown this gives all other vessels the information as to the intended course of the vessel sounding the signal. The giving of information by a vessel as to her intended course is specifically provided for in the rule.

The court below held that petitioner's tow was required to sound a one-whistle passing signal. Sec. 80.03 of Title 33 C. F. R. did not impose any obligation on petitioner's tow to sound a passing signal. Petitioner's tow was not required to sound a passing signal under Title 33 U. S. C. Sec. 203 because petitioner's tow and the tanker were not in a head and head situation.

CONCLUSION.

For the foregoing reasons this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Docket Nos. A. 171-47, A. 173-80, A. 173-81, A. 173-82, A. 175-68

DEEP SEA TANKERS, LIMITED, in its own behalf as owner of the Steamtug RINCON HILLS, and as bailee of the cargo laden thereon and SHELL OIL COMPANY, INC., as charterer of said vessel,

Libellants.

—against—

The Steamtug LONG BRANCH, the Railway Carfloats No. 61 and No. 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the Steamtugs METROPOLITAN No. 2 and METROPOLITAN No. 3, the Sand Scows GG-202, GG-150 and GG-104 and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the steam tug LONG BRANCH, for exoneration from or limitation of liability.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR OF N. J. No. 56, for exoneration from or limitation of liability.

In the Matter of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR OF N. J. No. 61, for exoneration from, or limitation of liability.

ATLANTIC STEVEDORING CO., INC.,

Libellant,

—against—

The Tanker RINCON HILLS, her engines, etc., and DEEP SEA TANKERS, LIMITED,

Respondent,

—and against—

The Tugs METROPOLITAN No. 2, METROPOLITAN No. 3 and LONG BRANCH, the Scows GG-202, GG-150 and GG-104; and Carfloats CRR OF N. J. No. 61, and CRR OF N. J. No. 56,

Respondents-Impleaded,

—and against—

METROPOLITAN SAND AND GRAVEL CORPORATION and THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondents-Impleaded.

OPINION

JOHN W. CLANCY, U. S. D. J.

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CLANCY, D. J.

This proceeding involves five related suits, all arising from the grounding of the tanker RINCON HILLS on November 26, 1951. They were consolidated for trial. The owner and charterer of the RINCON HILLS filed a libel against

Metropolitan Sand & Gravel Corporation, two tugs and three sand scows owned by Metropolitan, and against Central Railroad of New Jersey, a tug and two carfloats owned by it. Metropolitan answered the libel as respondent and as claimant of its vessels. Central Railroad of New Jersey did not answer the libel but instead filed three separate petitions for exoneration from and/or limitation of liability on behalf of each of its three vessels named in the libel. The fifth related suit was a libel brought by Atlantic Stevedoring Co., Inc., against the RINCON HILLS and its owners, in which the tugs owned by Metropolitan and the Jersey Central were impleaded.

FINDINGS OF FACT.

1. Shortly after noon on November 26, 1951 the tug METROPOLITAN No. 2 owned by the respondent Metropolitan Sand & Gravel Corporation, proceeded south in the East River. Her tow consisted of the three respondent scows loaded with sand, made up in tandem fashion close to each other. It was towed on two hawsers about 100 feet long. The tow thus had an overall length of 500 feet. The tug had 650 horse power. The tow was proceeding down river favored by the last of the ebb tide and in clear weather. When off pier 8, New York, the tug's master perceived the RINCON HILLS, a tanker, then about 1000 feet west of the light at the northwest corner of Governors Island. The METROPOLITAN No. 2 at that time was about 400 feet off the piers and at this point it began to pull in to starboard to South Ferry to proceed around the Battery. The Manhattan shore at this point veers sharply to the west so that his starboard wheel did not diminish its distance from the pier ends. When off pier 4 with her tow following relatively straight behind, the tug captain heard a one-blast signal from the RINCON HILLS. He did not answer, assuming from the respective positions of tanker and tow that the blast was not intended as

a signal directed at him. He proceeded to and around the Battery and into the North River, maintaining a distance of approximately 500 feet between his tug and tow and the pier line and the Battery Sea Wall.

2. Coming down river at the same time was the Central Railroad of New Jersey tug LONG BRANCH with a tow consisting of two car floats, one made up on either side. Each of the floats is 290 feet long on deck with a beam of 40 feet, without means of propulsion or control. One float was empty. The other float had on her middle track near her bow, two empty steel coal cars and a loaded box car. The bows of the floats were made fast close together so that the tow was approximately 80 feet wide at the bow and 115 feet at the stern. Passing piers 8 and 9 on her way down river, the tow was something more than 500 feet off the pier ends. Below pier 9 it angled to starboard toward the Battery. When it was off pier 9, its pilot noticed the RINCON HILLS down in the bay and then initiating a right turn. When the LONG BRANCH tow reached pier 5 it was 700 feet off the pier end because though she was moving to starboard the Manhattan shore angle of recession was greater than the angle of her course. When the LONG BRANCH tow was below pier 5 and its direction was westerly, the RINCON HILLS blew a single blast of her whistle. This whistle was not addressed to the LONG BRANCH or to any particular vessel but was only to warn all traffic in the East River of the RINCON HILLS' approach. The LONG BRANCH did not answer the whistle and this omission was in no respect negligent since the LONG BRANCH was not on a crossing course with respect to the RINCON HILLS nor head to head nor on any other course that required a signal. The LONG BRANCH tow negotiated her right turn into the Bay, behind and to the port of the sand tow. In the course of this turn she passed the RINCON HILLS which was then on the Range,

port to port about 200 feet off her bridge, near the long rack at South Ferry. She then proceeded to her destination in Jersey City.

3. The tanker RINCON HILLS, 523½ feet long and 68 feet beam, had come north from the quarantine anchorage in the control of a tug captain acting as pilot. She was making ten knots an hour when she arrived at the northwest corner of Governors Island where the pilot started a right turn to put himself on the Range intended to direct deep vessels away from the Dimond Reef north of Governors Island. Making this turn reduced the vessel's speed one knot so that at its conclusion she was running nine knots an hour and her heading was being held ten degrees to the left of the Range in order to avoid the expected effect of the ebb tide. Half way through this turn the captain blew a single blast intended to advise the traffic in the East River of his arrival and intent to navigate into the River. In the position of his heading at the time he blew this blast, any traffic in the East River, south of pier 5, more than 350 feet off the pier ends, would be to his starboard bow. He saw the LONG BRANCH tow in that relative position and blew four short blasts, intended, to use his own language, to take in "whatever was on the port side. It was a warning because they weren't giving me any break at all so far as the room was concerned." The four blasts were also an expression of his acute apprehension upon his realization of his own excessive speed. Immediately after he stopped his engines and ran two minutes with the engines stopped and with the ship heading under an amidships wheel steady on the deep water Range when he had made it. The stopping of his engines had had no more effect that reducing his speed less than one knot and the tide may possibly have had some effect also so that after the two minutes running without power, the tanker was still moving at a speed of

at least 7½ knots. The LONG BRANCH tow had by that time passed to his port and when it was opposite his bridge he ordered his engines full ahead and his helmsman to go hard left. This order was given at precisely the point where he, an experienced docking pilot, always turned left from the Range. The engines were put full ahead but unfortunately the helmsman turned the wheel a full sharp hard right and the RINCON HILLS, to use the expressive colloquialism of a tug captain, "took a nosedive" to starboard and ended up on the reef one and a half minutes after the full ahead order for the engines was effectuated.

4. The LONG BRANCH and the RINCON HILLS were never in a crossing position or in a head to head position or in any position that required a navigating signal from the LONG BRANCH. When two vessels are moving in opposite directions on adjacent arcs there comes upon each of them an instant when its head is directed at the other vessel. The RINCON HILLS never had the slightest doubt about the course of the LONG BRANCH and even if the LONG BRANCH were deemed at fault at failing to whistle a signal to the RINCON HILLS, such failure did not contribute in the slightest to the tanker's navigation or grounding.

5. The respondent tug, METROPOLITAN No. 3, had pursued the respondent METROPOLITAN No. 2 and its tow down the river, around the Battery and in the North River disengaged one of the scows from the tow, in accordance with an agreement made between the pilots of the tugs though the office had directed the METROPOLITAN No. 3 to put off the scow further down the Bay. Its performing its task in the North River did not have any effect whatever on the speed or the course of the METROPOLITAN No. 2 which has been found faultless.

6. Attending the RINCON HILLS were two tugs owned by the same owner, one of which had furnished the pilot of

the RINCON HILLS. That tug had proceeded north from quarantine and mid-way in the bay it went on the port side of the RINCON HILLS and was promptly ordered to resume its position to the tanker's starboard. The other tug had waited fifteen minutes for the arrival of the RINCON HILLS from a position 500 feet off the Battery Sea Wall. It was the intended job of both these tugs to assist the RINCON HILLS in negotiating its turn into the river and hold her up in the ebb tide as well as to control her sluggish steering. The RINCON HILLS pilot used neither.

7. The grounding of the RINCON HILLS was due entirely to the faulty navigation of the pilot in charge, his failure to exercise due care in earlier reducing her speed, his failure to use properly the tugs supplied for his use by the owner of the RINCON HILLS, the grossly negligent allowance of the helmsman's erroneous maneuver, and the failure of the officers in or near the pilot house timely to notice the helmsman's error when it occurred or until correction of it was too late. The RINCON HILLS never at any time navigated with respect to the METROPOLITAN tow. There was nothing in the conduct of the LONG BRANCH tow that contributed in any way to the grounding. That tow was handled with all due care with respect to itself and to the RINCON HILLS.

8. Before November 28, 1951, two days after the stranding of the RINCON HILLS, the Atlantic Stevedoring Company was engaged on the steamships TULANE and TRAFALGAR at piers 36 and 37, Atlantic Basin. Some of its cargo nets dangled in the waters of the Basin which became covered with oil. By order of the Fire Department the ropes were destroyed and the libellant, Atlantic Stevedoring Company suffered the loss of their value. The Court has reached the conclusion that identification

of the oil as that from the tanker RINCON HILLS was not established and foreseeability and causation by the tanker's neglect are doubtful.

CONCLUSIONS OF LAW.

1. The libel of Deep Sea Tankers, Limited and Shell Oil Co. Inc., as owners and charterers of the RINCON HILLS, is dismissed as to all respondents named therein, with costs to the respondents Metropolitan Sand & Gravel Corporation and METROPOLITAN No. 3.

2. The petitions for exoneration from liability of the tug LONG BRANCH and the carfloats No. 56 and No. 61 are granted, with costs to the Jersey Central.

3. The libel of Atlantic Stevedoring Co., Inc. against the tanker RINCON HILLS and Deep Sea Tankers, Limited, is dismissed with costs and the impleading petitions against the Jersey Central and Metropolitan tugs are dismissed without costs.

The liability in this case has been determined largely on the testimony of the libellant's witnesses. When the RINCON HILLS pilot testified before the Coast Guard eight days after his vessel's grounding, he was subject to every impulse and inducement to find a reason for the deviation from his course that resulted in his vessel reaching the reef. He never gave any reason for it except the helmsman's disobedience or mistake that resulted in his hard left wheel order being executed by a hard right wheel with his engines at full speed ahead. At that hearing his own counsel supplied him numerous leads to complain about the railroad car float. He rejected all of them and persisted from beginning to end in testimony that was well summarized by his own statement: "She didn't go hard left. That's all I know." That the railroad float had passed him relatively long before the giving of his hard

left order is demonstrable from his own testimony and from the charts which he marked and upon which he fixed the vessels' positions at different times. When he gave the alarm signal he fixed on a chart the position of the railroad float 2800 feet in front of him. The Court is not inclined to hold witnesses to exactness when marking a chart, but the pilot was the only witness who could testify to the position of the car float tow when he blew the alarm so we are accepting his testimony as his approximation of the distance between the tanker and the tug. Thus the pilot's drawing indicates a crossing of the Range to the east by the LONG BRANCH when the single blast was blown and crossing back to the west when the alarm was blown, he says, thirty seconds later. This seems to the Court an impossibility and renders both whistle signals unintelligible. Returning to the position of the float when he blew the alarm, his testimony is that at that point he then stopped his engines. Two minutes afterwards he gave the left wheel order. We put his speed at 7½ knots which he was certainly doing and he had passed the railroad float before giving the left wheel order. The speed of the railroad float we have calculated from the time of its start and of its reaching Jersey City. We have allowed 5 miles per hour at the foot of the East River and in the two minutes between the alarm signal and the left wheel order of the RINCON HILLS, the car float would have gone 900 feet on an arc from and below pier 4. This would have put her down near the long rack at South Ferry and passing the RINCON HILLS there as we have found. This agrees with the testimony of the LONG BRANCH captain whereas any supposition that the LONG BRANCH had crossed the Range and returned would require a matter of at least two minutes more to put the LONG BRANCH in that position. This fact is found as well in the testimony of the tanker's master which is most important. He ran from his chartroom when he heard the alarm and saw

the railroad float off the starboard bow. He never saw the METROPOLITAN float. If the master of the vessel could not see METROPOLITAN then it means that tow was never in the picture. How and why he saw the railroad float has been shown. He watched the railroad float approach and pass on the port side of his vessel without asserting his authority in any way. If his vessel was in any danger from the tow he would certainly have suggested or taken measures to avoid it. It never was in danger from the tow. The master's statement by the way that this vessel was always swinging cannot be made to accord with the midships rudder. The tanker's speed is confirmed by her pilot and by the only relevant portion of the testimony of the experts produced by the libellant. When all their testimony is digested, her speed at the time of the hard left order was put at about seven and one-half knots.

Despite his failure to deny or distinguish any of his answers to interrogations before the Coast Guard, the pilot changed the substance of his testimony at the trial. We refer especially to his alleged movement to starboard after the alarm and before he put his rudder midships. This is not accepted because it is an outright contradiction of his original testimony at the Coast Guard hearing and of its repetition by asserting the truth of that testimony at the trial. The helper tugs which were never employed by the RINCON HILLS pilot were there to assist in effecting a safe turn into the East River. This is evident from the fact that when the attending tug took up a position on the vessel's port during its progress up the Bay, it was ordered to the starboard side by the pilot. The other tug waited fifteen minutes either off the Battery or at a dock there as one witness put it. There is no explanation for the presence of the two tugs with the tanker at the Battery except that they were furnished for use by the pilot to manage the turn into the river of this admittedly deep-laden and sluggish vessel. The testimony

of the attending tug's pilot confirms every finding we have made and the overall testimony of the other tug's master we regard as in accord.

The testimony of the libellant's experts, except in as much as they established the speed of the RINCON HILLS, is unimportant because all of it was incorporated in a wholly irrelevant hypothetical question which presented to the Court a hypothetical case only and not a navigating problem of the RINCON HILLS. Without accentuating any of its other deficiencies, such as the right turn we have refused to find, the single assumption of a half minute or less for the full speed ahead of the engine movement of the tanker that preceded the grounding, destroys the validity of the conclusions reached by the experts. Whatever her bridge engine log book is supposed to disclose, her engine movement book shows that the engines were at full speed for a minute and a half and the engineer's story of the underscoring of the moment of its initiation is not only unsatisfactory on its face but is contradicted by the testimony of the tanker's master who said he stopped the engine immediately when he felt the vessel ground. He certainly felt that as soon as did his engineer.

One of the experts explained the effect of a full ahead motion of the propeller after the vessel was running with a stopped engine. The idea intended to be conveyed was that the hull moved sideways onto the reef. This vessel was moving at seven and a half knots and maybe the right rudder was operating before the propeller took over. The master of the tanker said the stem turned. And the pilot of the accompanying tug that was well up toward the bow was not talking of a sidewise motion when he described the vessel's motion as a nose dive and when he was graphically describing his hurrying to starboard to secure his own safety and that of his tug. He was avoiding the

tanker's stem. The testimony of the men who were at the scene cannot be contradicted by an uncertain hypothesis.

Little need be said of the other witnesses produced by libellant. They were partisan. The ferry pilots displayed animus and withered under cross examination.

Molloy was a straightforward witness who gave direct responsive answers. He said he did not hear the single blast. We cannot say that he did. He put the RINCON HILLS in the wrong place when she blew her alarm. We suppose most mariners would notice an alarm. He thought it was a signal to the attending tug calling it up for service, a quite intelligent conclusion at the time. Molloy himself was where he had a right to be and was not interfering with the tanker in any wise. In such circumstances he might well have noticed the signal without fixing her place too nicely. So far as the tide and its effect at the Battery goes, we believe this veteran of forty years of tug piloting in New York Harbor without a demerit for navigation probably knew as much about it as libellant's experts. His testimony we believe we have demonstrated was implicitly confirmed in the crucial respects of time and space by the RINCON HILLS pilot.

Nothing in the case distracts from the helmsman's error and nothing minimizes its effect.

The libel is dismissed.

Dated: New York, N. Y., June 20, 1956.

/s/ JOHN W. CLANCY,
United States District Judge.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 8, 9, 10 and 11—October Term, 1957.

(Argued December 10 and 11, 1957

Decided July 14, 1958.)

Docket Nos. 24439, 24440, 24441 and 24442

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Libelants-Appellants,

—against—

The steamtug LONG BRANCH, the RAILWAY CARFLOATS No. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX," the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents-Appellees.

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the Steamtug LONG BRANCH for exoneration from or limitation of liability.

[1841]

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR of NJ No. 56, for exoneration from or limitation of liability.

In the Matter

of the

Petition of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, as owner of the carfloat known and designated as CRR of NJ No. 61, for exoneration from or limitation of liability.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from a decree of the United States District Court for the Southern District of New York, in Admiralty. John W. Clancy, *Judge.* Opinion below reported in 1956 A. M. C. 1723. Reversed and remanded.

CHARLES S. HAIGHT, New York, N. Y. (Robert M. Julian, Gordon W. Paulsen, Richard G. Ashworth and Haight, Gardner, Poor & Havens, New York, N. Y., on the brief), *for libelants-appellants.*

LEO F. HANAN, New York, N. Y. (Charles J. Carroll, Jr. and Machlin, Speer, Hanan & McKernan, New York, N. Y., on the brief), *for respondent-appellee Metropolitan Sand & Gravel Corporation.*

GERALD J. MCKERNAN, New York, N. Y. (Vincent E. McGowan, New York, N. Y., on the brief), *for respondent-appellee Central Railroad Company of New Jersey.*

MEDINA, *Circuit Judge*:

On November 26, 1951, shortly after twelve o'clock noon, the "Rincon Hills," a Canadian tanker, grounded on Dimond Reef, off Governors Island in New York Harbor, and the damage to the ship and cargo is said to exceed one million dollars. Deep Sea Tankers, Limited, as owner of the "Rincon Hills" and bailee of her cargo, and Shell Oil Company, Incorporated, as charterer, within a few days filed a libel against certain tugs and tows of Central Railroad Company of New Jersey and Metropolitan Sand & Gravel Corporation, and against the Railroad Company and Metropolitan, asserting liability for the grounding because of alleged crowding and interference with the navigation of the "Rincon Hills" as she passed along the East River Range for deep draft vessels in her course up the East River. Three proceedings for exoneration from or limitation of liability were then brought by the Railroad Company on behalf of her tug and two carfloats; Metropolitan answered the libel of Deep Sea Tankers, and in the answer included a prayer for relief by way of limitation of liability to the value of Metropolitan's interest in her tug and three sand scows, in the event that they should not be exonerated. There was no separate limitation proceeding initiated by Metropolitan. The above described causes, together with another not involved on this appeal, were consolidated and tried together before Judge Goddard who died on August 26, 1955, after the conclusion of the trial but before the submission of briefs or other argument by counsel. It was stipulated that the

case would be submitted to Judge Clancy on the trial record made before Judge Goddard and, upon this record and the briefs of counsel, but without oral argument, Judge Clancy found the "Rincon Hills" solely at fault, exonerated the two tugs and tows and dismissed the libel. This appeal by libelants followed and, on motion of appellees, we have already held that Judge Goddard's trial notes formed no part of the trial record stipulated to be considered by Judge Clancy and hence are not part of the record now before us. 242 F. 2d 433.

Since the opinion and findings below are based upon the cold record alone, without the benefit of seeing and hearing the numerous witnesses who testified before Judge Goddard, and, as this Court has noted, "we have an eventual responsibility for the facts as well as for the law," *The Bellhaven*, 72 F. 2d 206, 209; *Thorne, Neale & Co. v. Reading Co.*, 2 Cir., 87 F. 2d 694, 696; see also *The Seeandbee*, 6 Cir., 102 F. 2d 577, 581, we have carefully read and studied the entire transcript of 6793 pages and the 196 exhibits and have made new findings of fact in accordance with the clear weight of the evidence. Because of the unusual circumstances to which reference has just been made, we shall set forth our findings in considerable detail.

A bird's eye view of the area within which the tanker and the tugs and tows were proceeding to their respective destinations is given by Chart 369 of New York Harbor. The "Rincon Hills" had left her anchorage at Quarantine in the Narrows, bound for 138th Street, East River; her intended course was through the Upper Bay, past Governors Island, along the East River Range for deep draft vessels, past Dimond Reef and thence up the East River. The Railroad steamtug "Long Branch" and the two carfloats were following and gradually overtaking the Metropolitan diesel tug with three fully loaded sand scows as

they passed under the Brooklyn Bridge down the East River; the destination of the Railroad flotilla was the yards in Jersey City, New Jersey, in a general westerly direction from the Battery, and that of the sand tow was a meeting place with another Metropolitan tug off the Battery, where one of the three sand scows was to be transferred to the other Metropolitan tug. A seemingly wide expanse of open water between the Battery and Governors Island, where small craft may go at will, is disclosed by Chart 369 to be in fact an exceedingly narrow passage for vessels of deep draft. Dimond Reef, in 24 to 27 feet of water, juts out like a sore thumb and the East River Range, with a steady 40 feet of water, is obviously designed as an indispensable aid to navigation for sea going vessels as they proceed up the East River. In terms of fairway for such vessels as they steam up and down stream is little more than 325 yards of deep water between the Range and the relatively shoal area in the neighborhood of the piers and ferry slips in the vicinity of the Battery. The Governors Island Ferry, the Ellis Island Ferry and the Staten Island Ferry all operate across the westerly end of the Range or thereabouts and they as well as most small craft are readily maneuverable and can quickly get out of the way of large steamers or tankers. The two tows involved in this case, however, as will shortly appear, were huge, slow-moving, cumbersome flotillas and it requires little argument to demonstrate that they would constitute a substantial menace to the navigation of large vessels in the vicinity of Dimond Reef, especially on an ebb tide, unless kept clear of the Range.

The "Rincon Hills" was a fully loaded turbo-electric tanker of 10,653 gross tons, 523.5 feet in length and 68.2 feet abeam, drawing 29.8 feet of water forward and 29.9 aft.

The diesel tug "Metropolitan No. 2," of 650 horsepower and 144 gross tons, was 80.6 feet long, beam 23 feet, depth 9.6 feet; the hawser connecting her with the sand scows was 12 to 15 fathoms in length; the scows C-G 202, C-G 150 and C-G 104 respectively 112, 113.4 and 113.3 feet long, fully loaded, were made up in tandem and "fast up close to each other" with hawsers and cross lines—a flotilla of about 500 feet overall. The other dimensions of the sand scows were: C-G 202, 320 gross tons, beam 33.1, depth 8.8; C-G 150, 308 gross tons, beam 32 feet, depth 8.9 feet; C-G 104, 327 gross tons, beam 32 feet depth 9.4.

The steam tug "Long Branch," of 950 horsepower and 229 gross tons, was 104.2 feet long, beam 25.7, depth 14.2. The carfloats Central 56 and Central 61 were of identical dimensions and of steel construction, 291 feet long, beam 40 feet, depth 10.6 feet. Each was a 3-track float, with a capacity of 17 freight cars. There were two empty coal cars and one loaded freight car on one of the floats, the other was light. The floats were on either side of the "Long Branch," all three tightly lashed together, with the bows of the floats brought nearly together ahead of the stem of the "Long Branch," which forced out the sterns of the floats fanwise. There are certain minor discrepancies and contradictions in the record respecting some of the figures, but they are substantially accurate. The sand scows and the carfloats were passive instruments without propulsion equipment of any kind.

At this point we think it will be helpful to separate the facts we deem beyond all reasonable doubt established by the record, so that the more controversial features of the case may be discussed against what we consider to be an unassailable background.

(1) The "Rincon Hills" sounded a single whistle blast, followed by the danger signal of four or five short blasts;

and there was no response to either of these signals by either of the two tugs.

(2) As the two tows proceeded downstream the Railroad carfloats gradually came closer and closer to the sand tow, intending to pass to port of the sand tow; and the carfloats did pass to port of the sand tow, the actual passing taking place after the carfloats went under the bow of the "Rincon Hills."

(3) The stem of the "Rincon Hills" barely missed collision with the carfloats as they crossed her bow.

(4) It was clear weather, with excellent visibility and a fresh westerly wind; the current was running on the ebb a full knot and a half in the direction of Dimond Reef, a fact which the masters of the two tugs did not take into consideration, as it was just about dead low water at the Battery and the two masters of the tugs, who knew it was about low tide, were not aware of the fact that the current continued to run on the ebb well over an hour after low water at the Battery.

(5) Just as or immediately after the carfloats crossed the tanker's bow the pilot gave the order "hard left, full ahead," which was repeated by the second officer and by the helmsman; but the helmsman, because of a "reaction" or intuitive fear of collision, disobeyed the hard left order and put the wheel hard right.

(6) The pilot in charge of the navigation of the "Rincon Hills" was a man of ripe experience, thoroughly familiar with New York Harbor and the set of the current on and near the Range. The masters of the Railroad and Metropolitan tugs were old hands at their trade and should have known what they were about.

General Observations

There were many witnesses, several on board the tanker. The sounding of the danger signal alerted some of these witnesses to the fact that someting unusual was going on. Some of them were on the tows or on ferryboats in the vicinity, one was in his office on the top floor of the Whitehall Ferry Building on shore. Obviously, some of these witnesses were interested; they varied as to intelligence, accuracy of observation and ability to understand the questions, some of which were highly technical. There was an almost universal and quite bewildering disposition by practically all eye-witnesses to guess at distances and time intervals in terms of seconds or minutes. The documentary evidence is, as always, important and we have been particularly impressed by the tanker's Bridge Bell Book. We reject the charge by appellees that the claim of crowding was manufactured out of whole cloth as an afterthought, and that the entries in the Bridge Bell Book were deceptively written up after the event to support the allegedly fictitious claim of crowding and to cover up the "wrong wheel movement of the helmsman." On the other hand, we take such colorful expressions in the testimony as "this carfloat came shooting across the bow of the ship," and "the ship took a nosedive," to be no more than rhetorical flourishes of little consequence or significance.

Except for those charged with the responsibility of navigating the tanker and the two tows, who were under a duty to observe other traffic in the East River, there was nothing to attract the attention of anyone to the scene off Dimond Reef until the danger signal was given. Thus the danger signal alerted some, including the master of the tanker, who was at that time in the chart room abaft the bridge, and the purser, who was in his stateroom counting money. The close proximity of the tanker and the carfloats

when a collision seemed unavoidable drew the attention of others to what occurred immediately prior to the grounding. Doubtless the attention of many others was attracted after the vessel grounded and was motionless. We have necessarily viewed with some skepticism elaborate descriptions, by witnesses not then aboard the tanker or the tows, of the relative positions of the vessels at various times prior to the grounding as honest but at least to some extent unreliable. Viewed from another angle, it seems to us perfectly natural for a person whose attention is thus suddenly focussed on an event or occurrence to see the part of the scene to which his attention is attracted, without taking in the whole picture. For example the master of the tanker ran out from the chart room upon hearing the four or five short blasts. He saw the carfloats which the tanker almost ran down; but did not notice the sand tow. We do not infer from this that the sand tow "was never in the picture," as found by the court below.

The Controversial Issues of Fact

In the discussion which follows we shall endeavor to find the correct answers to the following controversial questions: (1) what were the relative positions of the tanker on the one hand and the two tows on the other when the one-blast signal was given; (2) how close was the sand tow to the carfloats when the carfloats crossed the bow of the tanker; (3) what were the relative speeds of the tanker and the tows just before the "hard left, full ahead" order was given by the pilot; (4) what was the function of the two Meseck tugs, one to port and the other to starboard of the tanker as she steadied on the Range; and did any act or omission of the pilot or those aboard these tugs contribute to the grounding; (5) had the helmsman promptly obeyed the hard left order of the pilot would

the tanker nevertheless have grounded; (6) did the pilot change his course to the right after giving the danger signal and before he ordered "hard left, full ahead."

The Tugs and Tows

It is clear to us that the tugs and tows seriously obstructed the navigation of the tanker and that the negligent operation of both the tug "Metropolitan No. 2" and of the Railroad tug "Long Branch" contributed to the grounding of the tanker on Dimond Reef. We so find. But no fault is found against any of the sand scows or the carfloats nor against the tug "Metropolitan No. 3."

What made our task unduly difficult at the outset was not only the fact that the scene as portrayed in the opinion below is painted with a large brush, but also the confusion caused by a parade of witnesses, who had little or nothing to contribute to the case, and by a welter of inconsistencies and contradictions caused by the marking of charts, and the measuring of distances with dividers, and so on, by other witnesses who at times did not have the remotest idea of what they were doing. But a careful digesting of the entire record lends perspective; and the seeming fog and confusion are readily dissipated. We shall work our way back from the grounding.

While it is probable that the tanker bumped or scraped along the rocky surface of the reef before she fetched up, there is no doubt that she held fast at some part of the northerly tip of the reef, parallel with the Range and hence well south of the Range. We also find that the tanker was south of the Range when the "hard left full ahead" order was given. We shall discuss this point in some detail later on. As we have already indicated, the record in its entirety literally compels a finding that the stem of the tanker missed the stern of the port carfloat by the narrowest of

margins. As this finding is of such critical importance, we shall briefly review the testimony and some of the exhibits marked by some of those who testified.

One of the most impressive witnesses was Robert J. Wilcox, the helmsman on the tanker. This young man frankly admitted that he gave the wheel two or three turns to the right although the order "hard left" had been repeated both by second officer Richard and by himself. He said he did this instinctively and without thinking, because he saw the carfloats practically dead ahead and he thought he would ram them. The fact is that the stem of the tanker had already cleared the stern of the port carfloat, and there is at least a possibility that the stranding would have been avoided had Wilcox done as he was told. But we credit his testimony that the carfloats were so close that he thought he would ram them if he obeyed the "hard left" order. We shall return to Wilcox later when discussing the question of whether or not we should find that the tanker was also to blame.

Ernest Kuinlivan, the boatswain, was up in the forecastlehead to stand by the anchors in case of emergency, and perhaps to make fast a line from one or both of the assisting tugs. He could not have been in a better position to see the distance between the stem of the tanker and the stern of the carfloats. He testified that the clearance was about 30 feet. Philip, the purser of the tanker, ran out of his cabin when he heard the danger-signal, saw the carfloats off the tanker's starboard bow, thought there was going to be a collision and went back to his cabin when he saw the tanker was going to clear the carfloats.

There were two assisting tugs. The "William Meseck" had put the pilot aboard the Tanker at Quarantine. McConnell, the mate of this tug, in charge in the absence of Rowohlt, had first gone to port of the tanker but was

directed by the pilot to move over to starboard, which he did. He saw the sand tow cross the bow of the tanker as the danger signal was blown and testified that the carfloats were "right around the stern" of the sand tow. Edward R. Hoffman, at the wheel of the tug "Hayward Meseck," on the port side of the tanker, testified that the carfloats cleared by 10 feet. Mullock, the master of the tanker, fixed the distance as 25 or 30 feet. Richard, the second officer, testified it was 20 or 25 feet. Rowohlt, the pilot, said he just cleared by about 20 feet. It is claimed that this is contradicted by his testimony at the Coast Guard hearing, a few days after the grounding, but we find no contradiction in view of the diagram (Exhibit 9) prepared by Rowohlt at the Coast Guard hearing. He may have misplaced the tows by not properly portraying the crossing but the proximity of the vessel and the tows is unmistakable.

Henry G. D. Hoffman operating the Governors Island Ferry "Lt. Col. Robert E. Shannon," which left the Battery at 12:15 P. M. and arrived at Governors Island at 12:21 P. M., testified that the two tows and the tanker "seemed to all blend together" and that the clearance at the crossing of the tanker's bow was 10 feet—"the floats just missed getting hit." Roland H. Whelan, quartermaster of the ferry "Ellis Island," which left Ellis Island at 12:15 P. M. and tied up in her slip at the Battery at 12:29 or 12:30 P. M., thought there would surely be a collision. He testified, it "looked very close to me, maybe 10, 20 feet, and I couldn't see how an accident could have been avoided." William G. Tuttle, at the wheel of the "Gold Star Mother," the Staten Island Ferry arriving at her slip at the Battery 12:30 or 12:31 P. M., gives the clearance as 20 to 30 feet, "they were all in very close quarters," with the carfloats

about 100 feet behind the sand tow. We find no trace of animus in the testimony of these witnesses.

It is perhaps understandable that Hutton and Molloy operating the Metropolitan No. 2 tug, with the sand scows, and the "Long Branch," with her carfloats, respectively, should place their tugs and tows at so great a distance from the tanker as completely to negative any interference with the navigation of the tanker. Hutton was completely discredited; and Molloy's testimony at the Coast Guard hearing that his tow cleared the tanker by only 70 feet would seem an insurmountable obstacle to the acceptance of his trial estimate of 200 or 175 or 150 feet in view of the overwhelming testimony to the contrary.

Albert H. Reichert, at the wheel of the tug "Metropolitan No. 3," following some little distance behind the two tows with orders to take off one of "Metropolitan No. 2's" sand scows somewhere in the neighborhood of the Battery, adds little to appellees' version of the stranding. His testimony, when considered in the light of his statement (Exhibit YY), leaves us with the impression that he saw little if anything of the events preceding the actual grounding of the tanker. In any event, he says that the sand tow and the carfloats "were up and out in the North River when the ship was coming up on the range," that the tanker grounded when he was abreast of her and that the two tows "were in the North River at the time." It requires little argument to demonstrate the unreliability of this testimony. Rodden of the Staten Island Ferry "Cornelius Kolf," in the offshore pilothouse in No. 5 Slip South Ferry, is another broken reed. His testimony is a mass of confusion, as is indicated by his insistence that "I saw the Meseck tug blowing the alarm," and that he actually saw the steam from her smokestack as she blew the alarm. Bielinski, the first deckhand or mate of the

"Long Branch" gives the nearest point of the tanker to the carfloats at the time of passing as 400 to 450 feet. There is no trace of partisanship in his testimony, and no outbursts or profanity as in the case of Hutton, but he is clearly mistaken on many points, and we think it may have been unwise to have him present during the entire trial of four months, except for a week or so when he was ill, listening to the testimony of the other witnesses. He was called near the very end of the trial. Bernard Sheridan was sitting on a settee behind Tuttle on the "Gold Star Mother." If it was thought that he would contradict Tuttle's testimony in some vital particulars, his testimony must have been disappointing. He added precisely nothing to the case.

The owners of the tugs and tows lean far too heavily upon the witness William M. McGuire, who described what he said he saw after hearing the alarm signal as he sat at his desk in his office on the top floor of the Whitehall Ferry Building. If his attention was first attracted by the four or five short blasts, as he said, he could not possibly have seen the tanker as she steadied on the Range and he locates the two tows so far away from the tanker as to make his testimony of little value. (See dots placed by McGuire on Exhibit 78.) He characterizes the grounding as "the strangest thing I ever saw," and all the probabilities of the situation militate strongly against a version that describes the tanker, in charge of an experienced pilot, slowing down, then starting up, taking a sudden "sheer" to starboard and fetching up in Dimond Reef, all on a clear day, without any other vessel anywhere near her, and after blowing a meaningless danger signal. No explanation worthy of the name is given for his failure to mention to the representative of appellants' counsel, on the various occasions of their talks together, that he claimed to have seen what he later testified to; nor is it

clear to us why he read parts of the testimony given at the Coast Guard hearing and over 1000 pages of the trial transcript in preparation for his appearance on the witness stand.

Thus we have two long, unwieldy tows, one immediately behind the other and in a position to pass to port of the first tow, the intervening distance between the two being 100 feet or so, crossing the bow of the tanker on a westerly or northwesterly course, at a point where the tanker is already south of the Range. How did the tows get there?

Without discussing the testimony in detail, it will suffice to say that there is abundant evidence to support a finding that, as the tanker came up the bay and past Governors Island she swung on to the Range at about which time the pilot gave the one-blast signal. There was no traffic in sight up the East River except the two tugs and tows. We find the location of the tanker and the two tows was such as to make this signal for a port-to-port passage quite in order, and that he was, as he testified, signalling to the two tows. It was, at the time the single blast signal was given, a meeting head and head. We cannot agree that, as found below, this signal blast was not addressed "to any particular vessel but was only to warn all traffic in the East River of the Rincon Hills' approach." No such signal is provided for in the Navigation Rules for Harbors, Rivers, and Inland Waters, 33 U. S. C. §203, or in the Pilot Rules for Inland Waters, 33 C. F. R. §§80.01-80.36; nor was the one-blast signal here given with any such intent. Unnecessary signals are forbidden, Section 80.35; the proper response if the tugs contemplated a port-to-port passing was a single blast, Section 80.03; if there was some misunderstanding on the part of the tugs, or if they had appreciated the difficulties which necessarily would arise if they turned and exposed the entire string of sand tows and carfloats broadside to the ebb tide, they should

have sounded four or more short blasts, the danger signal, Section 80.1. See also La Boyteaux, *The Rules of the Road at Sea* (1920) 181, 185.

Also, it has been aptly written:

> But I must never fail to remember that in giving forth these "blasts," I must only convey to my opponents the course I am about to follow in accordance with the Steering and Sailing Rules. It must always be present to my mind that if I depart from the Rules, and make signals by "blasts," which may indicate a course or manoeuvre not authorized by the Rules, I and my owners and my ship will probably be condemned in costs * * *. Gray, *Rule of the Road* (4th ed. 1884) 32.

Moreover, the tugs and tows and the tanker were clearly in such relative positions that passing signals were in order; but the tugs made no response to the signal from the tanker, and, to make matters worse, they pursued, even after the danger signal, a course which made disaster almost inevitable.

The pilot waited about 30 seconds for a response from the tows, and then, as neither tug made any response whatever, he blew four or five short blasts—the danger signal. What he meant by this is too obvious for comment. He thought a dangerous situation was developing and he was quite right. But neither of the tugs made any response whatever; and there is undisputed proof in the very testimony of those operating the tugs that, with a reserve power always available for emergencies, no direction was given to the engineer of either craft to increase the speed of his engines. Moreover, there was a strong westerly wind of about 23 miles an hour that could not have failed to slow up the progress of the tows to an appreciable extent.

We hold that passing and danger signals are to be taken to mean precisely what is stated in the Pilot Rules, *supra*.

They have a clear and settled meaning as above stated, and the master who fails to make the appropriate and required response is guilty of a statutory fault and must take the consequences. It may well be that passing signals are frequently unnecessary, but such appears not to be the case here. The disregard of the danger signal is particularly blameworthy.

We are asked by appellants to rule that the approximately 325 yards of deep water from the 23-26-25-21 foot line off the lower Manhattan ferry slips and piers at the Battery to the westerly side of the Range off Governors Island is a "Narrow Channel," within the meaning of the Rule of Navigation, 33 U. S. C. Section 210, which requires vessels and craft when proceeding in such channel to "keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." Appellees insist that it is well settled law in this Circuit that this body of water is not a Narrow Channel, citing *The Wrestler*, 2 Cir., 232 Fed. 448; *The Bern*, 2 Cir., 74 F. 2d 235; *City of New York* v. *American Export Lines, Inc.*, 2 Cir., 131 F. 2d 902. See also Griffin, *The American Law of Collision* (1949), §36 n. 14 at p. 94. We are inclined to agree with this, especially in view of the extent and conformation of the harbor area involved and the cross or east and westbound traffic, although these cases do not deal with the precise body of water here involved. But we need not give that point the consideration here that it perhaps deserves, as we hold the tows at fault for being where they had no business to be at a time when a deep draft vessel was steaming up the Range. Even if not a statutory fault this is plain, ordinary negligence. See *The Wrestler, supra; The Concho*, S. D. N. Y., 58 Fed. 811, aff'd 2 Cir., 63 Fed. 1023. We hold that when large steamers or tankers or other deep draft vessels are on the Range or steadying on a course past Dimond Reef up the East River, tugs and tows and other unwieldy craft must keep away

from the waters near the Range. On an ebb tide the slightest interference with the navigation of deep draft vessels is apt to end in disaster, as there is practically no room in which to maneuver vessels several hundred feet in length and the current is bearing in a southwesterly direction right over the face of the reef. The danger to the entire waterfront as well as to other ships in the vicinity is also manifest, as oil or gasoline bubbling up to the surface from fractures of the cargo tanks caused by grounding on Dimond Reef or by collision, may at once or later be ignited.

Thus, even in the absence of any lack of response to signals, and irrespective of how they got there, the tows were at fault for not keeping away from the immediate vicinity of the Range, where they interfered with the navigation of the tanker.

The record demonstrates in the clearest possible manner, however, just how the tows found themselves on the Range. It was actually dead low water at the Battery at 12:18 P. M., eight minutes later than the predicted time. The current continued to run out over Dimond Reef on the ebb for about 1½ hours after low water at the Battery. We accept the data prepared by the Currents and Oceanography Branch of the Division of Tides and Currents of the U. S. Coast & Geodetic Survey (Exhibit 100) and reject conflicting data prepared by others. According to the testimony of Don C. Piper, Assistant Chief, the "current comes out of lower East River and is carried in a southwesterly direction, crosses Dimond Reef and on to Governors Island where it is turned to the westward." This witness gives the velocity of the current over Dimond Reef at the stage of the tide already indicated as one and a half knots, and the velocity was greater further up the river as indicated in Exhibit 100.

It so happened that both Hutton and Molloy, in charge of the two tugs, miscalculated the current cycle. Each was under the misapprehension that at low water at the Bat-

tery the current was slack or practically so. It is hard to believe that two such old hands at towing in New York Harbor would make such an error but their testimony to that effect is unequivocal and convincing. Each insists he made no allowance for the current, which is another way of saying that he operated his tug without taking into account that he had underneath him a current carrying him down in the direction of the Range and Dimond Reef at the rate of 1½ knots an hour.

As the incidents already described all took place in the ten or fifteen minutes preceding 12:30 P. M. on the day in question, it is highly probable that both Hutton and Molloy thought they barely had time to make the Battery with the very end of the ebb current, a matter of vital consequence to them. This would explain their remaining in midstream longer than usual, as there was less current near the piers. In any event, in a statement made on December 13, 1951, very shortly after the grounding, by Hutton to the attorney retained to represent Metropolitan, and reduced to writing and signed, Hutton says that after passing below the Brooklyn Bridge "the tow was favoring the middle of the river." He says that he saw the tanker "when the tow was about off Pier 9," and that "when approaching or in the vicinity of Pier 5 we began to pull in toward South Ferry so as to be in a position to round the Battery." Every effort to get away from this at the trial was unavailing. Finally, Hutton confirmed the statement, saying "the statement is true," and "it must be right, I signed it." Under these circumstances, and in view of the position of the vessels when they barely missed collision, we have no other alternative than to hold that the finding below to the effect that Hutton began to pull in when off Pier 8 rather than when off Pier 5 is clearly erroneous.

But, if Hutton's sand tow was favoring the middle of the river until he reached Pier 5, this fixes the position of Molloy and the carfloats following close behind but slightly to port of the sand tow. This is something Bielinski, standing in the pilothouse of the "Long Branch" alongside of Molloy as a sort of observer or lookout, would be likely to notice. And Bielinski's testimony on the subject is explicit. He testified that at Pier 8 the sand tow was ahead "of the starboard carfloat," "a little to our right," with the stern of the last sand scow just ahead "of the center of the starboard carfloat." Accordingly, the carfloats were further out in the river than the sand tow, and, as Hutton waited until he reached Pier 5 to turn in, the carfloats were still to his port. And this relative position of the two tows continued until after they passed the tanker, although they came closer together with each passing moment. Bielinski said the two tows were 200 or 250 feet apart when off Piers 8 and 9, that the distance was slowly closing; and we have already found that they were about 100 feet apart as they crossed the tanker's bow.

On the basis of these facts what happened to the two tows in the few minutes following Hutton's decision to pull in toward South Ferry at Pier 5 is merely an operation of the laws of physics. As the two tugs turned to the West the tows caught the force of the ebb current broadside and they swung out into the river, each now headed West or substantially so, but they were making about as much progress down toward the Range as they were making ahead. Thus strung out the two tows covered a distance of almost 900 feet, including the 100 feet between the two tows, through which 100 feet the tanker could not have passed, and they completely blocked off the tanker. The probability is that Hutton and Molloy were looking toward their respective destinations, completely oblivious

of the danger to the tanker, until they suddenly saw her close aboard.

In view of the foregoing we do not find it necessary to pass upon the question presented by the medical proof relative to Molloy's competence to manage the "Long Branch." We shall return to this subject and discuss it briefly, together with the matter of Charts and Tide and Current Tables, when we come to the subject of limitation.

The Tanker

We find it more difficult to determine whether or not there was fault on the part of the tanker. This involves a consideration of her speed, the various directions given by the pilot after the one-blast signal, whether the assisting tugs should have been ordered to make fast before they started to come alongside and found it impossible to do so, and the circumstances attending the disobedience by the helmsman of the "hard left" order. We have concluded that the tugs "Metropolitan No. 2" and "Long Branch" were solely to blame.

We accept the testimony of Rowohlt, the pilot. There was considerable credible corroborative proof, but we find it not necessary to describe it in detail. Most of the alleged discrepancies between his extensive testimony at the trial and his brief interrogation at the Coast Guard hearing disappear on close analysis. We do not read his testimony at the Coast Guard hearing as stating that there was no interference with his navigation by the two tows. On the contrary, he answered "yes" to the following question, "You said that if the tugs and tows had not been where they were, you would have taken the 'Rincon Hills' on a turn into the East River at about a point where the ship would have been opposite South Ferry, is that correct?" There is more to the same effect. When he testified that

his "hard left" order was not to avoid a grounding or to avoid the tows, we interpret this as meaning that he thought he was a safe distance from the reef and that the tows had already crossed his bow. When he gave it, he believed the "hard left, full ahead" order would take him safely up the East River. But, by way of hindsight, he testified at the trial that, even if the "hard left" order had been executed the tanker would have grounded nevertheless. While at the Coast Guard hearing he does not specifically say that he gave the right wheel order which brought the tanker south of the Range, this is because no questions were asked about his orders to the helmsman after the tanker had steadied on the Range; and he did testify, "We were running parallel with the range and the ship was about half the distance south of the range." He explicitly stated at the Coast Guard hearing that when he gave the one-blast signal the position of the vessel and the tows was one of meeting head and head. Moreover, he testified that both the single blast and the danger signal were addressed to and intended for the tows, and this entire testimony at the Coast Guard hearing must be read in the light of the sketch he then drew, Exhibit 9 on this trial, to which reference has already been made.

The substance of his recital at the trial of the tanker's maneuvers prior to the "hard left, full ahead" order was: after the single blast he steadied on the Range in a matter of seconds at half speed; that 30 seconds after the single blast he sounded the alarm, ordered the engines stopped and gave the right wheel order which was executed, bringing the tanker slightly south of the Range; that the two tows were a good ship's length and a half away when he sound the alarm; that two minutes elapsed between the sounding of the alarm and the grounding. He said he could not bear to port because of the presence of the sand tow

and that he could not reverse his engines as this would turn the tanker to starboard and on the reef. The Bridge Bell Book, which we consider the most important piece of documentary evidence in the case, gives the "full ahead" order at 12:26½ P.M. and at 12:27 P.M. contains the entry "stop struck bottom (Diamond Shoal)." We say this despite the discrepancies between these entries and those made by the oiler in the Engine Bell Book. Moreover, the little curved arrow leading to the words "(Diamond Shoal)" on the preceding line seems to us to be a natural way of making the record in this small note-book. In view of the other entries in the book there seems to us to be no reason to doubt the explanation that the use of the arrow and the previous line was thought preferable to placing "(Diamond Shoal)" on the line underneath. We find nothing suspicious about this entry or the entries in the rough log of the vessel. Accordingly, we find, on the basis of this and other proof, not only that the refusal to find that the right wheel order was given and executed was clearly erroneous, but in addition that the tanker was continuing to swing slightly to starboard when the "hard left" order was given, that she was still on a right swing when she hit the reef, and that the interval of time between the turning of the wheel to the right rather than to the left as ordered, and the correction of this mistake by the helmsman, was no more than 15 or 20 seconds at most. In response to the order to correct his mistake he was turning the wheel to the left as she struck. As we are favorably impressed by the competency of the experts who testified on the tanker's behalf and the accuracy of their opinions on the subject of the lateral movement of the vessel, we are convinced that in all probability the tanker could not have cleared the reef if the "hard left" order had been properly and promptly executed. See Knight, *Modern Seamanship*

(11th ed. 1948) 294. But we cannot be certain of this and hesitate to make a finding to that effect because there is no way of knowing with any degree of accuracy what the precise position of the tanker was with relation to the reef when the order was given.

The speed of the tanker was approximately 7½ knots, even after the engines were stopped. Under normal conditions this would not be excessive. We have found it impossible to estimate the speed of the tugs and tows. Perhaps the sand tow was making 3 knots or so and the carfloats more. We estimate these speeds through the water rather than over the ground. The question then is: from the moment it was apparent that a dangerous situation was developing ahead, did the pilot take every reasonable and available means of meeting it. When the single blast signal was given the intended course of the two tows could not have been known by Rowohlt. It is still difficult to understand Molloy's persistence in following close behind the sand scows and to port of the sand scows. With the power at his disposal, and the fairly light load as compared with a full load of 17 cars, he could easily have passed the sand tow to starboard and got out of the tanker's way. It is not unlikely that his mental operations were affected to some extent by his chronic hypertension and by the sedatives he was taking on his doctor's advice. For all Rowohlt knew the carfloats were headed up Buttermilk Channel. In any event, it was not until he got no response from either tug to his single blast signal that Rowohlt knew or could have known that a dangerous situation was developing. We can only conclude that the failure to respond to the single blast signal and the manner in which the two tows proceeded thereafter was due to negligence and inattention on the part of Hutton and Molloy, and their testimony gives ample support to this conclusion.

[1864]

Accordingly, we must test the question of fault on the part of the tanker by ascertaining what, if anything, Rowohlt could have done to avoid running down the car-floats or coming perilously close to the reef after he sounded the danger signal. He did stop his engines. Could he have safely reversed his engines? We have concluded, on the basis of the expert opinion testified to, and other supporting proof, that this maneuver would have brought the tanker on the reef. In this connection it must be borne in mind that a current of one and one-half knots was flowing in the direction of and over Dimond Reef. There was little or no possibility that reversing the engines could have had any effect other than to increase the danger. How about the assisting tugs? Rowohlt had already ordered one of them from the port to the starboard side of the tanker. Surely there was no occasion to have more than two assisting tugs and it seems quite reasonable to place one of them to port and the other to starboard. The dangerous situation, due in no small part to the failure of the two tows to respond to the single blast signal, developed only when it became apparent that the two tows were oblivious to or unmindful of the way they were obstructing the progress of the tanker on the Range; and this, as it later turned out, was due to the miscalculation by both Hutton and Molloy of the force, velocity and direction of the current. At the time the single blast signal was given McConnell was in the very act of bringing the "William Meseck" in close to make fast to the tanker on or near her starboard bow. But this became impossible as Rowohlt gave his right wheel order, and the swing to starboard which brought the tanker south of the Range forced McConnell to drop back. We may add, parenthetically, that the only fair inference to be drawn from McConnell's testimony, taken in its entirety, is that the right swing he was describing

was the result of the right wheel order given after the sounding of the danger signal, and not to any action of the tanker due to the mistake of the helmsman later on. Edward R. Hoffman testified that he was in charge of the tug "Hayward Meseck" to port of the tanker, and that he was prevented from making fast to the tanker's port bow by the proximity of the sand tow. The sand scows came so near his tug that he dropped in close alongside the port side of the tanker, and he was forced to stay there as the carfloats immediately followed the sand scows. This brief review of the testimony we think disposes of the claim that proper use was not made of the assisting tugs.

Accordingly, this phase of the case comes down to the act of the helmsman in disobeying the "hard left" order of the pilot. Ordinarily, such disobedience, if it contributed to a collision or grounding, would constitute a fault chargeable to the vessel. It is the most serious charge made against the tanker in this case, and the one that has caused us the most difficulty. Taking all the attendant circumstances into consideration, however, we have concluded that an *in extremis* situation existed and the natural and instinctive reaction of the helmsman, faced as he thought with the certainty of ramming the carfloats, is excusable. It will be recalled that the "hard left" order was repeated both by the second officer Richard and by the helmsman himself. We find the tanker free from fault.

Limitation of Liability

The Railroad, within six months after notice of claim, filed petitions for exoneration from or limitation of liability as owner of the "Long Branch" and of each of the two carfloats. All procedural requirements were concededly complied with; and we are presented with several interest-

ing questions of law, none of which was passed upon by the court below, as the tanker was found to be solely at fault and the tug and the carfloats were exonerated.

Appellants, without citing any authority, claim that the "Long Branch" and the carfloats were not engaged in any maritime undertaking but were acting merely as a ferry in an exclusively railroad operation, and they would have us hold that the legislation embodied in 46 U. S. C. Sections 183 and 185 was not intended by the Congress to be applicable to railroad lighterage in New York Harbor, for the reason, among others, that the inclusion of vessels engaged in railroad car lighterage would not contribute in any way to putting American shipping upon an equality with that of other maritime nations. And we are referred to clauses used in Uniform Bills of Lading as in some way supporting this view. But we think it too clear to require extended discussion that the tug and tow were vessels within the meaning of the words "any vessel" in the Limitation of Liability Act. The operation here involved was maritime; those aboard each of these vessels doubtless came under the protection of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Section 901 *et seq.*; and the fact that the carfloats were designed and built for the specific purpose of transferring railroad freight cars from one railroad terminal to another in and about New York Harbor does not make the operation any the less maritime in character.

Appellants also contend that neither the Railroad nor Metropolitan is entitled to limit its liability because both the tug "Long Branch" and the tug "Metropolitan No. 2" were unseaworthy with the knowledge and privity of their owners. With respect to both tugs it is claimed by appellants that no copies of the Charts, Tide Tables and Current Tables issued by the United States Coast and Geodetic Survey were provided to the tugs to be kept on

board always available for use. But both Hutton and Molloy were obviously familiar with the waters covered by the Charts of New York Harbor. As to the Railroad the evidence is that Charts as well as Current Tables were available and could have been obtained on demand at the Dispatcher's Office at any time by Molloy or other tug captains in the employ of the Railroad, if they were to operate in any part of the Harbor concerning which they felt further information should be had or if they had any other special need of them. The evidence concerning Metropolitan is less clear but it is probable that Charts were available or actually on "Metropolitan No. 2" but the Current Tables were not. The "Long Branch" and the "Metropolitan No. 2" each had on board a Commercial Tide Calendar giving high and low water at Sandy Hook, the Battery and Hell Gate. Taking the evidence as a whole we think both the Railroad and Metropolitan acted reasonably in committing the navigation of their tugs to these two men of many years experience towing in the very waters involved in this case without making further provision for either Charts or Current Tables. Many of the witnesses testified that it was not customary to have them on board harbor tugs. We are still at a loss to understand how Hutton and Molloy miscalculated the current cycle; but the mere fact that they did so does not convince us that the failure to make further provision for Charts and Current Tables aboard these tugs was a wilful fault by the owners such as to deprive them of the benefits of the Limitation of Liability Act.

As to Molloy appellants most earnestly press the claim that there was wilful fault on the part of the Railroad in permitting him to continue as Master of the "Long Branch," despite knowledge of his chronic high blood pressure. We think, however, that it is a sufficient answer to say that a competent medical examiner, acting on behalf of the Rail-

road, passed him subject to reexamination as fit for duty. It may well be that there was inexcuseable delay in producing some of the records and others were never produced; but what we considered to be the whole story came out in the end and we find nothing to impugn the good faith of the medical examiner.

Appellants also raise an interesting and important question not previously passed upon by us, so far as we are aware, and on which there are conflicting decisions in the District Courts for the Eastern and Southern Districts of New York and elsewhere.[1] It will be recalled that Metropolitan filed no separate or other petition for limitation of liability but, long after the six months period after notice of claim as provided in 46 U. S. C. Section 185, Metropolitan alleged the Limitation Act, 46 U. S. C. Section 183(a), as a partial defense to the libel. Appellants assert that there can be no limitation of liability unless a proper claim therefor is made, either by the filing of a petition for limitation or by way of defense to a libel or other court proceeding within six months after notice of claim. In other words, appellants would have us hold that every claim of limitation of liability asserted under 46 U. S. C. Section 183(a) is subject to the six months requirement of 46 U. S. C. Section 185.[2]

The law is well settled that a petition to limit liability pursuant to 46 U. S. C. Section 185 is valid and effective

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1 Six months time limit applicable: *Cantwell* v. *Meade*, E. D. N. Y., 120 F. Supp. 406; *The Irving*, S. D. N. Y., 33 F. Supp. 59; cf. *The Joseph O'Donnell*, E. D. N. Y., 37 F. Supp. 120.

Six months time limit not applicable: *De Cruz* v. *Hicring*, D. N. J., 60 F. Supp. 397; *Cantey* v. *McLain Line, Inc.*, S. D. N. Y., 40 F. Supp. 887; *Coryell* v. *Pilkington*, S. D. Fla., 39 F. Supp. 142; *Carpenter* v. *Mary R. Mullins, Inc.*, D. Mass., 33 F. Supp. 10.

2 Section 183(a):

> The liability of the owner of any vessel * * * for any loss, damage, or injury by collision * * * done, occasioned, or incurred, without the

only if it is filed within six months after the shipowner receives written notice of claim. *The Fred Smartley, Jr.*, 4 Cir., 108 F. 2d 603; *Standard Wholesale Phosphate & Acid Works, Inc.* v. *Travelers Ins. Co.*, 4 Cir., 107 F. 2d 373; *The Irving*, S. D. N. Y., 28 F. Supp 585, aff'd 2 Cir., 107 F. 2d 1011; *The Grasselli Chemical Co. No. 4*, S. D. N. Y., 20 F. Supp. 394.

There is, however, a separate and distinct procedure by which a shipowner may limit his liability in accordance with 46 U. S. C. Section 183(a). A shipowner may institute a separate proceeding by the filing of a petition for limitation or he may plead the limitation statute, 46 U. S. C. Section 183(a), in his answer as a defense to suit against him. See 3 *Benedict on Admiralty* (6th ed. 1940) Section 508.

The Third Circuit, in a well-reasoned opinion by Judge Goodrich, has held that the six-month period does not govern a plea of limitation by way of answer. *The Chickie*, 3 Cir., 141 F. 2d 80, 84-85. In reaching its decision in *The Chickie* the Court reviewed the historical development of the two different procedures available to shipowners to limit their liability. We are in accord with the analysis developed in Judge Goodrich's opinion and we hold that a plea of limitation by way of answer is not subject to the six-month time limit in Section 185. It is to be noted, however, that all those interested, including the "Rincon Hills" as bailee of the cargo, are parties to the consolidated proceeding now before us in which the respective claims of limitation are asserted.

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privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Section 185:

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter * * *

The first statute authorizing the limitation of liability, the forerunner of Section 183, was enacted in 1851, 9 Stat. 635. In 1872 the Supreme Court promulgated admiralty rules of procedure which permitted a shipowner to petition for limitation of liability. Shortly thereafter the Congress enacted the substance of these rules into law. In commenting on the purpose of the rules, the Supreme Court said they "were adopted for the purpose of formulating a proceeding that would give full protection to the shipowners in * * * a case" where there were "various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo." "They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defence by way of answer to a libel, or plea to an action, if the ship-owners should deem such a mode of pleading adequate to their protection." *The Scotland*, 105 U. S. 24, 33-34. It is unnecessary to comment on the variety of situations that may arise, in some of which concursus is highly desirable if not indispensable and in others not.

In practice it developed that the proceeding by way of petition for limitation of liability was often a source of delay and circuity of action, because shipowners did not institute this independent proceeding until after the question of liability had been litigated and determined against them. To alleviate the abuses inherent in this situation, the Congress, on June 5, 1936, amended Section 185 to require that a petition for limitation must be filed within six months of notice of claim.

Section 185, as amended, does not refer to Section 183 (a), and no reason has been advanced by appellants for making the right to limitation as provided in Section 183(a) subject to the six months time bar. Indeed, the Congress amended both Section 183(a) and Section 185

simultaneously in 1936 without specifying any time limit in Section 183(a). Moveover, the abuses which resulted under Section 185 prior to its amendment are not encountered when limitation is pleaded by way of answer, because the libelant, by filing its libel, controls the time within which the remedy must be invoked. Therefore, in accord with *The Chickie, supra,* we hold that the Metropolitan plea of limitation in its answer was not barred by the six months time limit of 46 U. S. C. Section 185.

Appellants, pursuing what seems to be another phase of the point just above discussed, assert that Metropolitan "posted no bond or stipulation." If all that is meant by this is that the requirements of Section 185, as to time and the posting of a bond or stipulation, are to be read into Section 183, it will suffice to say that we hold otherwise. On the other hand, when limitation of liability is asserted by way of defense in the answer there are interlocutory remedies open to a libellant to prevent loss or depreciation of the vessel by requiring surrender or the posting of security. These are procedural matters which do not appear to affect the substantive rights of the parties and they are normally litigated before or at least during trial. As the record discloses that certain proposed stipulations were served by Metropolitan on the office of libelants' proctors but were apparently mislaid, and there are references to attempts to agree upon a form of stipulation similar to the one entered into with the Railroad, we have concluded that, in this unclear state of the record, we shall and do leave this point open, to be decided by the District Court on the remand.

We next consider whether the Railroad and Metropolitan limitation funds must include the value of all craft in each of the two flotillas, as is urged by appellants, or whether the surrender of the tugs "Long Branch" and "Metropolitan No. 2," and not the scows or carfloats, is

sufficient for the purpose of limiting liability, as contended by the respective appellees. If the question were an open one we would be disposed to include the whole flotilla if we could, especially in the case of the carfloats, but we must take the law as we find it, and the question is no longer open. In *Liverpool, Brazil & River Plate Steam Naviga ion Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 4[illegible], libelant's steamship was damaged while it was moored at a pier in Brooklyn when a carfloat lashed to the port side of respondent's tug collided with it. The tug was proceeding up the East River with the carfloat on its port and a disabled tug on its starboard side. All three vessels were owned by respondent. The sole question before the Supreme Court was "whether the value of the whole flotilla should not have been included in the (limitation) decree." The Court held that only the value of the tug was required by law to be included, because the carfloat, although it was the vessel which collided with the steamship, was a "passive instrument in the hands of" the tug, and "for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it." Previously there had been disagreement among the Circuits regarding this question. See *The Begona II*, D. Md., 259 Fed. 919. But the Supreme Court, in an opinion by Justice Holmes, in the *Liverpool* case agreed with the Second Circuit view that the tug and tow did not become one vessel and placed the question at rest on the theory that the words "any vessel" in the Limited Liability Act meant the offending vessel and not others attached to it, even though all were in common ownership and engaged in a common venture. We are not at liberty to disregard this binding precedent simply because a contrary view may seem to reach a conclusion more in keeping with the realities of this particular case.

[1873]

As we have previously noted, it is clear that the car-floats and sand scows in tow of the tugs "Long Branch" and "Metropolitan No. 2" were merely passive instruments of navigation. They had no motive power of their own. Accordingly, only the value of the two tugs need be included in the limitation fund.

Those cases cited by appellants, in support of their position that the passive instrument as well must be surrendered, involved a breach of contract where the libelant had entered into a contractual agreement with the respondent, either for the transportation of himself and his goods, *The Big Chief*, E. D. Mo., 75 F. Supp. 496; see also, *The Columbia*, 9 Cir., 73 Fed. 226, or of employment, *Standard Dredging Co.* v. *Kristiansen*, 2 Cir., 67 F. 2d 548. As no such contractual relationship existed between any of libelants and either the Railroad or Metropolitan, the cases cited by appellants are not in point. This distinction is noted in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 332, a case involving exoneration under the Harter Act, as follows:

> This court held (in Liverpool) that it was necessary to surrender only the active tug, saying "that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it." But this is far from saying that the entire flotilla might not be regarded as one vessel for the purposes of the undertaking in which the common owner was engaged at the time of the collision. The distinction seems plain. There the libel was for an injury to a ship in no way related to the flotilla. It was a pure tort—no contractual obligations were involved; and the simply inquiry was, What constituted the "offending vessel"? Here we must ask, What constituted the vessel by which the

contract of transportation was to be effected? a very different question.

See also, *In re O'Donnell*, 2 Cir., 26 F. 2d 334.

Moreover, if fault is attributable to more than one of the vessels engaged in a common venture or enterprise, each with motive power of its own, then each such vessel must be surrendered. *United States* v. *The Australia Star*, 2 Cir., 172 F. 2d 472. Likewise, if a vessel in tow of a negligent tug is found at fault, the value of both vessels must be included in the limitation fund. *Petition of Lake Tankers Corp.*, S. D. N. Y., 1955 A. M. C. 55; *The Bowling Green*, E. D. N. Y., 11 F. Supp 109, aff'd 81 F. 2d 1017. But, in the case before us, as in *Liverpool*, no fault whatever is attributable to the sand scows or to the carfloats. It is true that they made the flotillas more cumbersome, but it does not follow that they were at fault, and we hold they were not.

The decree below is reversed and the consolidated cases are remanded for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July, one thousand nine hundred and fifty-eight.

Present:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the S/T "RINCON HILLS", and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Libelants-Appellants,

—against—

The steamtug "LONG BRANCH", the RAILWAY CARFLOATS No. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX", the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents-Appellees.

Index No. 24439

JUDGMENT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and action remanded for further proceedings not inconsistent with the opinion of this court; with costs to the appellants.

A. Daniel Fusaro
Clerk

[292] and it looked to me as though if I had stayed on the direct course or on the range that I had a risk of collision.

Q. Did the Rincon Hills respond to the right-wheel order you gave? A. Yes, sir.

Q. Can you tell us whether she actually came off the range across the line? A. Yes, she came off the range line to the south. I was observing the lights and we had at that time cracked the range lights back to the south.

Q. When you say "cracked to the south," would you explain a little more what you mean by that? A. Well, in other words, instead of running directly head on to the range, and by opening the red light to the south of the green light, that would bring me off the range; in other words, south of the range, to avoid colliding with the carfloats.

Q. When you turned south of the range line course, is that the same side of the range line on which lies Diamond Reef? A. That is right, sir.

Q. Did you observe anything with respect to the speed of the Jersey Central tug and carfloats in relation to the speed of the sand tow? A. It appeared to me that the carfloats and tug

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[339] this answer, page 27:

"Q. Where did he appear to be bound? A. Well, I took it for granted he was bound for the stakeboats in Jersey City, and the Jersey Central also bound for Jersey City."

Did you give that answer? Were you asked that question and did you make that answer? A. That is correct, in this respect, that when I was asked that I was up on the range far enough to distinguish the sand tows and I

know then that the sand tows would either be bound for the stakeboats or somewheres in that vicinity by that particular time. When I was way out here, I didn't know, I couldn't tell whether they were Metropolitan, Steers, or I couldn't tell whether it was Jersey Central or who they were. I think I stated that before, that I didn't know.

Q. How long after that was it that you gave the one-blast signal? A. After the first sighting?

Q. Yes. A. Oh, I don't know. It may be a minute or two.

Q. Are you guessing or have you any reason to believe? A. As I said before, I had—I didn't take no

* * * * *

[373] going south or northwest or what? A. I know they were heading south, but just which direction they would be later heading, I didn't know.

Q. If the two tows had proceeded south on the courses they were heading without swinging off to the westward, was there any state of traffic or other vessels which would have prevented the tows from continuing south and right across Diamond Reef towards Governor's Island shore? A. I didn't see any tows in that vicinity that would have stopped them from doing that.

Q. What is the depth of water? What is the shallowest depth of water above Diamond Reef? A. Well, the shallowest depth on Diamond Reef is about 24 feet.

Q. Were these tows drawing anything like 24 feet? A. I doubt it.

Q. Why did you wait the interval you did at the time you first observed the tugs and tows until the time when you blew your one short whistle signal? A. Well, I waited for a decision because we weren't on head and head or anywheres near so. So I waited until I could make an estimation of which way they were going to head. At the first sighting there [374] was such a difference in the headings

that anything could be decided beforehand and, therefore, I couldn't make a decision which way they were going.

Q. By that, then, do you mean that you waited until you reached that decision before you gave your one-blast whistle signal? A. That is right.

The Court: You never did get any signals from them?

The Witness: None whatsoever that I could hear.

The Court: You are sure of that?

The Witness: Yes, sir.

Q. How was the wind blowing from or—how was it blowing as between your ship and the sand tows? A. Well, the wind was very strong westerly wind and that would carry their sound away from me, if they did make any sound, and had a possibility to anyway.

Q. Is it right that the wind was blowing from your ship towards the sand tows? A. That is right.

Q. And the Jersey carfloats? A. That is correct.

Q. As you observed the sand tow from her position when you first sighted her, will you tell us what, if any, effect the ebb tide had on her

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[797] Mr. Haight: Yes.

By the Court:

Q. How far ahead of the Rincon Hills did the sand tow pass? How close? A. You mean how close to the bow of the ship when they passed?

Q. Yes. I think you said that the sand tow passed across the bow. A. Well, I wouldn't say they passed across the bow. They was setting down to cross the bow, so as

near as I can remember they cleared the ship possibly about 40 feet.

By Mr. Haight:

Q. When you say they cleared the ship, what part of the sand tow would you describe? A. That was the last scow, the stern of the last scow.

Q. Did the stern of the last scow clear your tug, the Hayward Meseck? A. Yes.

Q. By about what distance? A. I would say about the same distance, 40 feet possibly.

Q. At that time what was the distance between your tug's starboard side and the port side of the

* * * * *

[1538] the sand tow disappeared from your view entirely? A. Well, I don't know. I didn't pay much attention to it after that.

Q. At the time that the alarm signal was blown did you see the sand tow or had she disappeared from your view? A. I don't recall on that.

Q. At the time the Rincon Hills blew the one-blast signal was she still swinging to the right or had she steaded on the range at that time? A. She was steady on the range then.

Q. Then did she continue to be steady, continue for any length of time or any period of time? A. Well, I couldn't say just how long, but she was on the range, and I started to come in and get alongside.

Q. And at the time the alarm signal was blown was the Rincon Hills on the range then? A. Yes, sir.

Q. Was she steady at that time? A. Yes, sir.

Q. And it was some time after the alarm signal was blown that the tug—that the Rincon Hills started to go to the right, isn't that so? A. That is right.

Q. How long after the alarm—how long a period [1539] of time elapsed between the alarm signal and when the Rincon Hills started to go to the right you don't know, do you, sir? A. I wouldn't say for sure, no. It wasn't very long but I couldn't say in time, though.

Q. Captain McConnell, at the time that you were off the starboard—at the time that you took your position off the starboard side of the Rincon Hills, 20 feet off the bridge, wasn't the Rincon Hills at that time heading for the Battery? A. Yes, sir.

Q. And that is the time when you observed the sand tow up off Pier 9, isn't that right? A. No, sir.

Q. When did you observe the sand tow with respect to that? A. When he was—when I was coming alongside of the ship.

Q. Do you remember testifying before the Coast Guard? A. Yes, sir.

Q. You remember these questions, and you gave these answers—

Mr. Haight: Page?

Mr. Hanan: Page 9.

Q. —"Q. When you dropped back alongside the

STATUTE

Title 33 C. F. R. Sec. 80.03 (Pilot Rules Inland Waters)

§ 80.03 Signals. (a) The whistle signals provided in the rules in this part shall be sounded on an efficient whistle or siren sounded by steam or by some substitute for steam.

(1) A short blast of the whistle shall mean a blast of about one second's duration.

(2) A prolonged blast of the whistle shall mean a blast of from 4 to 6 seconds' duration.

(3) One short blast of the whistle signifies intention to direct course to own starboard, except when two steam vessels are approaching each other at right angles or obliquely, when it signifies intention of steam vessel which is to starboard of the other to hold course and speed.

(4) Two short blasts of the whistle signify intention to direct course to own port.

(5) Three short blasts of the whistle shall mean, "My engines are going at full speed astern."

(b) When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle.